Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

CHARLES R. ROBINSON IV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The affect of *Apprendi v. New Jersey* on the Federal Sentencing Guidelines.

II. Whether the United States Court of Appeals for the Seventh Circuit erred in failing to find plain error.

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CITATIONS TO OPINIONS AND ORDERS ENTERED IN THIS CASE

The following citations to the opinions and orders entered in this case will be recited in reverse chronological order.

The opinion of the United States Court of Appeals for the Seventh Circuit upon which this petition is seeking review is reported at *United States v. Robinson*, 250 F.3d 527 (7th Cir. 2001). The opinion has been reprinted in the appendix attached hereto.

The opinion of the United States Court of Appeals for the Seventh Circuit in which this court granted *certiorari* is found in a table at *United States v. Robinson*, 215 F.3d 1331 (7th Cir. 2000). The opinion can be accessed via Westlaw at 2000 WL 689182 (7th Cir., May 23, 2000) and is reprinted in the appendix attached hereto. The order entered by the District Court in the Central District of Illinois is reported at *United States v. Robinson*, 76 F. Supp. 2d 941 (C.D. Ill. 1999) and is reprinted in the appendix attached hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 3, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. §§ 841(a) and (b) reprinted in the appendix attached hereto.

STATEMENT OF THE CASE

This petition presents the issue of the affect of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000) on the Federal Sentencing Guidelines. This Court recently held that any factor that increases a defendant's sentence beyond the statutory maximum must be proved beyond a reasonable doubt to the jury. *Id.* The ruling in *Apprendi* should be extended to require drug quantities and other relevant conduct attributable to a defendant to be proved beyond a reasonable doubt at the sentencing stage.

This issue arises in the context of a federal criminal case in which the defendant, Charles Robinson IV, was sentenced to 100 years in prison. The defendant was charged on a three

count indictment. The first count alleged the defendant violated 21 U.S.C. § 841(a)(1) for possessing with the intent to distribute 16.8 grams of cocaine base ("crack") and 27.7 grams of cocaine. The second count alleged that the defendant violated 21 U.S.C. § 841(a)(1) for distributing 2.1 grams of cocaine base ("crack"). The third count alleged that defendant violated 21 U.S.C. § 841(a)(1) for possessing with intent to distribute 14 grams of cocaine base ("crack"). On December 4, 1997, a jury found the defendant guilty beyond a reasonable doubt on all three counts.

The Sentencing Proceedings Below

On June 2, 1998, the district court for the Central District of Illinois sentenced the defendant to 100 years imprisonment. In sentencing the defendant, the court relied upon the evidence at trial and the information included in the presentence report. The court found that the evidence elicited at trial consisted of 27.6 grams of powder cocaine and 32.9 grams of crack. However, the court attributed an additional 5,213.7 grams of crack to the defendant based upon relevant conduct in accordance with U.S.S.G. § 1B1.3. Consequently, the defendant was penalized on count 1 for violating § 841(b)(1)(B), which carries a 40-year maximum sentence. The defendant was also penalized on count 2 for violating § 841(b)(1)(C), which has a 20-year maximum sentence, and on count 3 for violating § 841(b)(1)(B), which has a 40-year maximum sentence. After adding enhancements to his base offense level, the defendant had an adjusted offense level of 43 and a criminal history category of VI, yielding a sentencing range of life imprisonment. However, since a defendant's sentence can not be greater than the statutory maximum sentence, he was sentenced to the maximum one hundred years of imprisonment.

Defendant appealed the district court's ruling of relevant conduct to the Seventh Circuit Court of Appeals.[1] The defendant argued that the relevant conduct attributed to him at the sentencing was not relevant to his offense of conviction pursuant to U.S.S.G. § 1B1.3. The Seventh Circuit vacated and remanded the sentence for further proceedings. In so holding, the court stated that although a judge is not required to hear personally from a witness, it believes that it is "not a terribly bad idea" to do so when one witness is providing 97% of the relevant conduct.

On remand, the district court for the Central District of Illinois again sentenced the defendant to 100 years of imprisonment. Following the appellate court's remand instructions, the district heard testimony from witnesses and again held the defendant accountable for over 500 grams of crack. As result, the defendant was again sentenced for two counts in violation of 21 U.S.C. § 841(b)(1)(B) and one count in violation of 21 U.S.C. § 841(b)(1)(C).

Defendant again appealed the district court's ruling regarding the relevant conduct to the Seventh Circuit.[2] In his second appeal, the defendant argued that the conduct attributed to him was not relevant conduct pursuant to U.S.S.G. § 1B1.3 as it was not part of the same scheme or plan. This time, the court of appeals affirmed the defendant's 100-year sentence. The court found that the relevant conduct calculations by the district court were based upon trial evidence and by witnesses at the sentencing hearing.

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1. The defendant raised other issues on his first appeal, but this petition does not raise any of those issues.

2. Defendant raised other issues on appeal, but the petition does not raise any of those issues.

Defendant filed a Petition for Writ of Certiorari, which was granted, and the sentence was vacated and remanded in light of *Apprendi*. On remand, the Seventh Circuit affirmed the 100 years, holding that *Apprendi* did not apply to the sentencing guidelines and that the court did not commit plain error.

The basis for federal court jurisdiction in this case is pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

Introduction

This case involves an issue stemming from this Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Since the inception of this case, federal district and appellate courts have been bridled with ascertaining the meaning and repercussions of the opinion. In particular, the courts have struggled with *Apprendi*'s ramifications on the federal sentencing guidelines. The appellate courts are in need of clarification of the *Apprendi* decision and direction as to how to treat defendants with an *Apprendi* issue.

The case at bar would permit this Court to determine the parameters around which the guidelines can be utilized, an issue this Court reserved in *Apprendi*. In the case at bar, the defendant was sentenced to 100 years of imprisonment. The defendant was charged with possession of 30.8 grams of crack, distribution of 2.1 grams of crack and possession of 27.6 grams of cocaine. The alleged amount would put the defendant at a level 28. With a criminal category of IV and a level 28, his sentencing range in accordance with the guideline table would be 140 to 175 months (11.6 to 14.5 years). However, the sentencing judge attributed an

additional 643.6 grams of crack to him through relevant conduct, raising his base offense level to 36. The level was then elevated an additional two levels for a gun enhancement and another four levels for being a leader/organizer. After the enhancements were added, his offense level was elevated to 43. His sentence under the guidelines was life imprisonment. The judge ordered him to 100 years, the sum of the maximum sentences for each count. In essence, the enhancements that were only found by a preponderance of the evidence and not submitted to a jury raised his sentence 85.5 years more than the maximum of 14.5 years that it would have been without the enhancements.

I.

THIS PETITION SHOULD BE GRANTED TO DEFINE THE EFFECT *APPRENDI v. NEW JERSEY* HAS ON THE UNITED STATES SENTENCING GUIDELINES.

On June 26, 2000, this Court authored an opinion that will forever change sentencing in the federal court system. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Moreover, the spirit of the opinion foreshadows further developments and alterations in the federal sentencing scheme. Specifically, the opinion may affect the constitutionality of the Federal Sentencing Guidelines.

The United States Circuit Courts have confined *Apprendi* to cases in which the defendant is sentenced beyond the statutory maximum as provided for in the offense statute. The lower courts, with the exception of one district court, have refused to extend the rationale and underlying

constitutional concerns of *Apprendi* to the sentencing guidelines. *See United States v. Baltas*, 236 F.3d 27, 40-41 (1st Cir. 2001); *United States v. Garcia*, 240 F.3d 180 (2d Cir. 2001); *United States v. Williams*, 235 F.3d 858, 863-64 (3d Cir. 2000); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000); *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000); *United States v. Nance*, 236 F.3d 820, 826 (7th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1026-27 (9th Cir. 2000); *United States v. Heckard*, 238 F.3d 1235-36 (10th Cir. 2000); *United States v. Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000). Nonetheless, there has been enormous controversy over the issue. Appellate courts have recognized that the *Apprendi* opinion does not "clearly resolve" its effects on the guidelines. Those courts have even reserved the issue for further appeal. *United States v. Meshack*, 225 F.3d 556, 576 (5th Cir. 2000). Despite the circuit courts' decisions, one district court has taken the bold view that *Apprendi* does extend to the sentencing guidelines and that a holding otherwise would render the opinion a "dead letter in most substantial narcotics cases in the federal courts." *United States v. Norris*, 143 F. Supp. 2d 243, 248 (E.D.N.Y. 2001). The controversy must be resolved as the courts await a decision by this Court.

A. *Apprendi* Extends to the Sentencing Guidelines Because the Same Constitutional Concerns in *Apprendi* are Apparent in the Federal Sentencing Scheme

The constitutional concerns underlying the *Apprendi* are identical to the concerns raised by the sentencing guidelines. In *Apprendi*, this Court recognized that at stake were

> constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee

> that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury," Amdt. 6. Taken together, these rights entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

Apprendi, 120 S. Ct. at 2356 (citing *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310 (1995)). In essence, *Apprendi* focused on a defendant's constitutional rights.

The sentencing guidelines destroy a defendant's constitutional rights as taught in *Apprendi*. The decision in *Apprendi* gives a historical overview of constitutional rights and legislative history leading up to those rights. The court speaks of its decision in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970), making clear that due process and the associated jury protections extend to "determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Apprendi*, 120 S. Ct. at 2359 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 251, 118 S. Ct. 1219 (1998) (Scalia, J., dissenting)). In discussing the meaning of *Winship*, this court posited that

> [i]f a defendant faces punishment beyond that provided by statute when an offence is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not . . . be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 120 S. Ct. at 2359. This is exactly the loss that occurs to the defendant by way of the sentencing guidelines.

The indictment of the defendant in the case at bar, as well as similarly situated defendants, gives a quantity of drugs for which the prosecutors will attempt to prove beyond a reasonable doubt. The federal sentencing scheme allows a defendant to determine the range of punishment he will receive if found guilty of the acts alleged in the indictment. The sentencing range is ascertained by analyzing the offense statute and the sentencing table as found in the guidelines. These two statutes working in tandem provide the defendant with notice of the punishment he will be subjected to if found guilty by reasonable doubt as proscribed in *Winship*. However, the defendant's constitutional rights are violated, and the teachings of *Apprendi* are trampled at the sentencing hearing. The guidelines allow a prosecutor to enhance a defendant's sentence beyond the range as found in the sentencing table by using a preponderance of the evidence standard. In effect, the prosecutors circumvent the defendants rights by alleging a small amount of drugs in the indictment for which he will have to prove beyond a reasonable doubt and then at the sentencing phase add additional quantities of drugs, possession of a gun and role in the offence to increase his sentence for which he needs to only prove by a preponderance of the evidence. *Apprendi* focused on the right of a defendant to know for what he is being punished. *Apprendi* did not know that the prosecutors would increase his sentence by alleging at the sentencing stage that his acts were discriminatory. Similarly, in federal court, a defendant does not know what the prosecutor holds behind his back until the sentencing stage.

Ergo, the holding of *Apprendi* should eliminate the prosecutor's tactic of not alleging all of the crimes or factors for which he will be sentenced. Thus far, these factors have been characterized as "sentencing enhancements" opposed

to "elements of the crime." *Apprendi* discounted labeling the factors and instead focused on result of the factor. In discussing the holding of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975), and the *Winship* protections, this Court posited that a State could not "circumvent the protections of *Winship* merely by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.' " *Apprendi*, 120 S. Ct. at 2360 (citing *Mullaney*, 95 S. Ct. at 1889). Despite the name given to a factor that increases a defendant's punishment, the factor should be proved beyond a reasonable doubt. *Apprendi* began to define the defendant's Sixth Amendment rights, but stopped short because the guidelines were at issue in *Apprendi*. This Court should grant this petition to decide *Apprendi*'s effect on the sentencing guidelines.

B. *Apprendi* Applies to the Sentencing Guidelines as they are Given the Force and Effect of Statutes.

Apprendi held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 120 S. Ct. at 2362-63. Furthermore, "[i]t is unconstitutional for a legislature to remove form the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 2363 (citing *Jones v. United States*, 526 U.S. 227 at 252-253, 119 S. Ct. 1215 (opinion of Stevens, J.). The "prescribed statutory maximum" of a sentence is found not only in the offense statute, but also in the sentencing guidelines.

Justice Thomas predicted that the sentencing guidelines would become questionable after the publication of *Apprendi*. The guidelines are statutes themselves, and *Apprendi* therefore applies when the sentencing range prescribed within is altered by facts not proved by reasonable doubt. As noted by Justice Thomas in his concurrence "the Guidelines 'have the force and effect of laws.' " *Apprendi*, 120 S. Ct. at 2380 n.11 (Thomas, J., concurring) (quoting *Mistretta v. United States*, 488 U.S. 361, 413, 109 S. Ct. 647 (1989) (Scalia, J., dissenting)). Moreover, because judges may not exceed the maximums imposed by the sentencing guidelines they are legally binding enactments. Furthermore, the guidelines have been incorporated into the federal statutes by 18 U.S.C. § 3553(b). As a result, the application of *Apprendi* renders a defendant's sentence that is above his original, pre-enhancement range unconstitutional. The enhancements, such as relevant conduct, role in the offense and gun enhancements, must be proven beyond a reasonable doubt to increase a defendant's sentence in order to comport with *Apprendi*.

The dissenters in *Apprendi* recognized this potential extension and foreshadowed the issue before us a today: "[a] defendant is entitled to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of [his] sentence under a determinate-sentencing scheme." *Apprendi*, 120 S. Ct. at 2393-2394. The majority in *Apprendi* did little to allay this notion, but did restrict its holding: "[t]he guidelines are, of course, not before the court. We therefore express no view on the subject beyond what this court has already held. *See, e.g., Edwards v. United States*, 523 U.S. 511, 515, 118 S. Ct. 1475 (1998)" *Apprendi*, 120 S. Ct. at 2366 n.21. Ironically, the majority only cited to *Edwards* and did not cite to *Mistretta*, the case that originally upheld the constitutionality of the sentencing guidelines.

The Supreme Court should grant this petition to further allow itself to define the effect of the *Apprendi*. The dissenters believe that *Apprendi* will eventually extend to every factor; Justice Thomas questions the constitutionality of the guidelines given the majority's holding; and the majority expressed no view, saving it for another day. As a result, the facts in the case at bar would allow this court to finally express its view on the aftermath of *Apprendi* and the constitutionality of the sentencing guidelines.

II.

A SENTENCE THAT EXCEEDS THAT OFFENSE STATUTORY MAXIMUM THEREBY VIOLATING *APPRENDI* IS PLAIN ERROR.

When an issue is not raised below, the reviewing court reviews for plain error. In order to establish plain error, the defendant must show: (1) there was an error; (2) the error was plain; (3) the error affected the defendant's substantial rights; and (4) it seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544 (1997). The defendant in the case at bar was sentenced to 100 years imprisonment. However, his offense statute provides for a maximum of 60 years. Nonetheless, the appellate court found that such a discrepancy, although meeting the first three prongs, did not affect the fairness, integrity or public reputation of judicial proceedings.

To the contrary, the defendant's sentence does affect the fairness, integrity and public reputation of the judicial proceedings. In determining whether this prong has been met in cases which involve an *Apprendi* issue, the appellate courts

generally ask whether the jury would have found the defendant guilty of the quantity if such allegation was given to them to decide. In the case at bar, the jury was not asked to consider the type of drug or quantity of drug. Given the scant evidence of the type of drug, it is likely that the jury would not have found beyond a reasonable doubt that the substance was crack. In addition, the jury may not have been convinced beyond a reasonable doubt as to the quantity of drugs found during his arrests. As a result, the sentence given to the defendant was plain error.

In addition, the defendant's sentence of 100 years — given that his alleged quantity of crack was only 32.9 grams — is so outrageous that it affects the fairness, integrity or public reputation of judicial proceedings. The sentence surprised the Seventh Circuit, which noted that his sentence was reserved for "big-time drug offenders who are involved with huge quantities . . ." *United States v. Robinson*, 164 F.3d 1068, 1070 (7th Cir. 1999). The court further demonstrated its astonishment in stating that level 38 is generally "a spot one usually thinks of as being reserved for the kind of big-time drug dealers depicted in 'The French Connection.' " *Id.*

The defendant's sentence meets the fourth prong of the plain error test. As a result, the defendant's sentence should be vacated and remanded to comply with the holding of *Apprendi*.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the question presented by this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MAY 3, 2001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-4071

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES R. ROBINSON IV,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 97 CR 30025 — **Richard Mills,** *Judge.*

On Remand From
The United States Supreme Court

SUBMITTED JANUARY 26, 2001 — DECIDED MAY 3, 2001

Before BAUER, RIPPLE, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* On direct appeal, we affirmed Charles Robinson's cocaine convictions but vacated his sentences, reasoning that the police reports relied on by the

district court to calculate the vast majority of his relevant conduct lacked sufficient indicia of reliability. *See United States v. Robinson*, 164 F.3d 1068, 1071 (7th Cir. 1999). After the district court resentenced Robinson, we rejected Robinson's new appeal and affirmed the amended judgment in an unpublished order. *See United States v. Robinson*, No. 99-4071, 2000 WL 689182 (7th Cir. 2000). Subsequently, the Supreme Court granted Robinson's petition for certiorari, vacated our judgment, and returned the case to us for further consideration in light of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). *See Robinson v. United States*, 121 S. Ct. 559 (2000). Both Robinson and the United States have submitted statements pursuant to Circuit Rule 54 indicating their position as to the action we should take on remand.

Because Robinson did not raise an *Apprendi* claim either time that he was sentenced, our review is only for plain error. *United States v. Nance*, 236 F.3d 820, 824 (7th Cir. 2000). This means we must determine (1) whether there was error at all, (2) if so, whether it was plain, (3) whether the error affected Robinson's substantial rights, and (4) whether it seriously affected the fairness, integrity, or public reputation of the proceedings. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997). As with most unpreserved *Apprendi* claims presented to this court, Robinson fails to establish the fourth prong of the plain-error test. For the sake of completeness, however, we will briefly address the other prongs of the test.

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

doubt." *Apprendi,* 120 S. Ct. at 2362-63. The implication of *Apprendi* for defendants charged with drug offenses under 21 U.S.C. § 841(a) is that they may not be subjected to a statutorily enhanced sentence based on drug type and quantity, as provided in § 841(b), without those elements being charged in the indictment and proven beyond a reasonable doubt. *Nance*, 236 F.3d at 824 (collecting cases). However, when a defendant's sentence does not exceed 20 years imprisonment — the maximum under § 841(b) for possessing/distributing the smallest amount of cocaine — *Apprendi* is irrelevant. *Talbott v. Indiana*, 226 F.3d 866, 869 (7th Cir. 2000); *accord United States v. Jones*, __ F.3d __, No. 00-2531, 2001 WL 294306, at *3 (7th Cir. Mar. 28, 2001); *United States v. Huerta*, 239 F.3d 865, 876 (7th Cir. 2001).

In this case Robinson was convicted of (1) possession of both powder and crack cocaine with intent to distribute, (2) distribution of crack, and (3) possession of crack with intent to distribute. The district court sentenced him to consecutive prison terms of 40, 20, and 40 years, respectively. The distribution sentence does not exceed 20 years, so it drops from the analysis. *Talbott*, 226 F.3d at 869. And since both of the remaining counts alleged explicitly that Robinson possessed quantities of crack greater than five grams, the indictment satisfies the requirement that the type and quantity of drugs necessary to trigger a statutory enhancement — in this case 40 years pursuant to 21 U.S.C. § 841(b)(1)(B)(iii) — be charged in the indictment. But, because the issue of drug quantity was not submitted to the jury, the district court erred when it sentenced Robinson to 40 years on each of the possession convictions.

Nance, 236 F.3d at 825. Moreover, *Apprendi* makes it apparent that these errors were plain. *United States v. Patterson*, 241 F.3d 912, 913 (7th Cir. 2001); *United States v. Jackson*, 236 F.3d 886, 888 (7th Cir. 2001). Also, because the errors increased Robinson's sentences by 20 years, there is no question that the errors affected his substantial rights. *See United States v. Mietus*, 237 F.3d 866, 875 (7th Cir. 2001) (7-year increase affects defendant's substantial rights); *Nance*, 236 F.3d at 826 (22-month increase). So Robinson's case easily meets the first three prongs of the plain-error test.

To be entitled to a new sentencing hearing, however, Robinson must also establish that the sentencing errors seriously affected the fairness, integrity, or public reputation of the judicial proceedings. When applying this test to *Apprendi* cases, we ask whether "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' " *Nance*, 236 F.3d at 825 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). In practical terms, we analyze whether there was overwhelming evidence that with respect to each 40-year count Robinson possessed more than five grams of crack. *See Patterson*, 241 F.3d at 914; *Mietus*, 237 F.3d at 875; *Jackson*, 236 F.3d at 888. In this case the police arrested Robinson twice, each time recovering quantities of crack that exceeded five grams. These arrests underlie the two 40-year sentences. As we will explain, as to each 40-year count, the government's evidence of drug quantity was overwhelming.

Regarding the first arrest, Officers Jerry Castles and Jeremy Woolridge testified that they separately responded

to a call relaying a Steak 'N Shake security guard's report of a man at the drive-thru with an open bottle of beer between his legs as he sat in his car. Castles identified Robinson as the driver and arrested him. Robinson's car was searched, and Castles testified that in addition to drug paraphernalia, he uncovered an off-white chunky substance. Woolridge testified that he assisted in the search and discovered a plastic baggy containing a white powdery chunky substance. Castles then drove Robinson to the police station. After he was processed, Officer Joseph Pisarek transported Robinson to the county jail. Pisarek testified that when they arrived at the jail he searched Robinson and discovered a small, white, rock- like substance. The next morning, Officer Michael Pennington searched Robinson's impounded car. Pennington testified that his search uncovered a brown pill bottle containing what appeared to be crack.

State forensic scientist Michael Cravens testified that these seized items were 2/10 of a gram of crack, 4/10 of a gram of crack, 27.6 grams of cocaine, and 16.2 grams of crack. Robinson did not contest on cross-examination the recovery, nature, or quantity of these seized items, nor did he submit any evidence of his own disputing these facts. Rather, his trial strategy was to argue that he possessed the drugs for personal consumption, not distribution. The jury obviously rejected this defense.

Regarding the second arrest, Officer Dennis Baird testified that he responded to a Super 8 motel manager's report of suspected drug activity in a hotel room. Baird testified that the occupant of the room was absent when he arrived but that a vehicle matching the hotel manager's

description of the guest's car soon drove up. Baird testified that while standing on the passenger side of the car he observed Robinson seated in the driver's seat and a bag of what appeared to be crack next to the gear shift. When Baird identified himself as a police officer and asked Robinson to exit the vehicle, Robinson attempted to drive away. Baird blocked the parking lot exit with his car and Robinson abandoned his vehicle and unsuccessfully attempted to flee on foot. Baird testified that he discovered the bag of crack on the ground about 10 feet from Robinson's car. State forensic scientist Mark Paiva testified that the bag held 14.5 grams of crack. Again, Robinson did not contest the nature, quantity, or recovery of the bag of crack.

Robinson's decision not to contest the quantities of drugs obtained in the searches is significant, given his theory that the drugs were for his personal use. Officer Kelly Cain testified that based on his experience most crack addicts purchase quantities ranging from less than one gram to 3 1/2 grams for personal use. On cross-examination, Cain stated his belief that personal-use amounts of crack top out at 5 to 6 grams. Thus, to establish that he possessed the drugs for personal use, *i.e.*, to create doubt that he was a drug dealer, Robinson had two options for closing the gap between the amount of drugs recovered and the personal-use-amount ceiling. He could have (1) contested the quantity of drugs recovered, or (2) contradicted Cain's testimony regarding the five to six-gram personal-use ceiling. We believe that Robinson's decision to pursue only the latter course indicates that the government's drug quantity evidence was solid. In fact, it is hard to imagine any reasonable argument Robinson could have presented disputing the stated drug

quantities. This is not a case in which witnesses testified that they observed the defendant with certain quantities of drugs. Here, the police actually recovered the drugs from Robinson, and a forensic scientist testified that each of the two most significant packages of crack weighed well over 5 grams. Accordingly, the government presented overwhelming evidence that Robinson twice possessed more than 5 grams of crack. *See Mietus*, 237 F.3d at 875 (evidence overwhelming where government presented uncontested evidence that police seized drugs in excess of amount necessary to trigger increased sentence); *cf. United States v. Westmoreland*, 240 F.3d 618, 635 (7th Cir. 2001) (reversible error where amount of drugs recovered not sufficient to trigger increased sentence and drug quantity contested at trial). Thus, Robinson's *Apprendi* argument comes up short.

Perhaps foreseeing the difficulty of meeting the plain error test, Robinson's Circuit Rule 54 statement urges us to adopt a novel interpretation of "statutory maximum." Robinson argues that "statutory maximum" means the maximum penalty within the relevant range specified by the sentencing guidelines. Thus, Robinson contends, any fact that affects a guideline range determination, *e.g.*, a drug quantity determination for purposes of relevant conduct, must be submitted to a jury and proved beyond a reasonable doubt. This argument is based on an expansive reading of Justice Thomas's concurring opinion in *Apprendi*, which states that any fact that is a "basis for imposing or increasing punishment — for establishing or increasing the prosecution's entitlement — is an element [of the crime]," not just a sentencing factor. *Apprendi*, 120 S. Ct. at 2379 (Thomas, J., concurring (joined by Scalia, J.)). Thus, Justice Thomas reasoned, a fact that

triggers a mandatory minimum sentence is an element even though it does not affect the statutory maximum penalty, *e.g.*, a fact that restricts a 0- to 10-year sentencing range to a 5- to 10-year range must be submitted to a jury and proved beyond a reasonable doubt. Robinson argues that we should apply Justice Thomas's reasoning not only to mandatory minimum penalties imposed by statute but also to all sentencing guideline issues. Because we have already rejected this suggested extension of *Apprendi* both as it applies to mandatory minimum penalties, *United States v. Williams*, 238 F.3d 871, 877 (7th Cir. 2001) (collecting cases); *United States v. Smith*, 223 F.3d 554, 566-67 (7th Cir. 2000), and sentencing guideline issues, *Hernandez v. United States*, 226 F.3d 839, 841 (7th Cir. 2000), we think Robinson's argument lacks merit.

For these reasons, we believe that the sentences imposed by the district court did not violate the rule announced in *Apprendi*. The original judgment is, therefore, reinstated.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MAY 23, 2000

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 16, 2000[1]
Decided May 23, 2000

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Terrence T. Evans, *Circuit Judge*

No. 99-4071

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES R. ROBINSON IV,

Defendant-Appellant.

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1. After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a); Cir. R. 34(f).

Appendix B

Appeal from the United States District Court
for the Central District of Illinois.

No. 97-30025

Richard Mills, Judge.

ORDER

In this successive appeal, Charles R. Robinson IV objects to the 100-year sentence reimposed on him, under the United States Sentencing Guidelines, for distribution of crack cocaine. Previously, in his direct appeal, we affirmed Robinson's conviction but vacated the sentence on the ground that the calculation of his "relevant conduct," that is, that Robinson distributed at least 500 grams of crack (*see* U.S.S.G. § 2D1.1(c)), relied too heavily on the information provided by a Gina Loonsfoot, information which was presented only through the presentence report. Loonsfoot did not testify, yet information she provided accounted for 97 percent of the drug quantity on which Robinson's hefty sentence was based. Under circumstances in which evidence of such importance was found exclusively in the presentence report, we required resentencing so that the calculation of relevant conduct could be based on information with greater "indicia of reliability." *United States v. Robinson*, 164 F.3d 1068, 1071 (7th Cir. 1999).

And now we have it. The relevant conduct calculations at resentencing are based on trial evidence and testimony by witnesses at the sentencing proceeding. Our review is for clear error. *United States v. House*, 110 F.3d 1281 (7th Cir. 1997).

Appendix B

As at the original sentencing procedure, at resentencing the district court properly relied on trial evidence and found that the amounts alleged in the indictment should be included in the calculation of the amount of drugs involved in Robinson's offense for the ultimate determination of his offense level. Those amounts are 27.6 grams of powder cocaine and 32.9 grams of crack.[2] If the judge had stopped here, Robinson would find himself at base offense level 28 with a far, far shorter sentence than he finds himself serving. But based on trial testimony, the district judge found that Robinson should also be held accountable for the 56.7 grams of crack attributed to him by David Alton and the 54 grams attributed to him by Michael Smith, for a total of 143.6 grams of crack, which, again if the court had stopped here, would put Robinson at base offense level 34. But 143.6 grams of crack is 356.4 grams short of the 500 grams on which Robinson was, in fact, resentenced. It was the distribution of 500 grams of crack that landed Robinson at base offense level 36. If the calculation of the base offense level is to stand, there must be evidence that Robinson distributed over 350 additional grams of crack, beyond that gleaned from the trial testimony. At the first sentencing it was Loonsfoot whose statements, taken from police reports and set out in the presentence report, provided the evidentiary basis for the additional crack. As we said in our 1999 opinion, reliance on what the presentence said that Loonsfoot had said gave us pause. This time there is a stronger evidentiary basis for

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2. Because the 27.6 grams of powder cocaine are not necessary to the final calculation, we will, as we did in the first appeal, ignore the powder cocaine to avoid the necessity of using the Drug Equivalency Charts from the sentencing guidelines. *See Robinson*, at 1070.

the findings. Three live witnesses put Robinson's distribution far over 500 grams. Loonsfoot, by the way, is not among them, as her testimony was unavailable at the time of resentencing.

All three of the witnesses testified at the sentencing hearing. Despite Robinson's contention that the three were not testifying about conduct which could be considered relevant, we find that all three testified as to conduct which is, in fact, clearly relevant. The testimony went to the same conduct as that alleged in the indictment — distribution of crack cocaine. The testimony involved events which occurred on a regular basis, close in time to the charged conduct. *See United States v. Bacallao*, 149 F.3d 717 (7th Cir. 1998).

Robinson's girl friend, Stephanie Whitehead, testified that from June 1996 until December 1996, Robinson received cocaine from Tory Clay and Scott Allen and that he then converted it into crack, approximately 75 percent of which he sold. She testified that during that time, Robinson distributed approximately 5,103 grams of crack. Clay and Allen corroborated Whitehead's testimony. Clay[3] testified that from January 1995 until July 1996 he supplied Robinson with between 6 and 8 kilograms of powder cocaine, which Robinson cooked into crack; that would amount to about 4,500 grams of crack. Allen testified that he supplied Robinson with over 660 grams of cocaine between July 1996 and November 1996, which Robinson converted into crack. If he sold 75 percent of the crack, as Whitehead estimated,

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3. Robinson claims that Clay's testimony should have been excluded. We reject that claim for the reasons expressed by Judge Mills in his opinion (see p. 14 n.8).

he would have sold 499.67 grams of crack, based on Allen's testimony. The court specifically found the witnesses credible; their testimony shows distribution of crack far in excess of 500 grams.

Robinson objects, however, to the use of the testimony of these three persons and contends that our remand required that Loonsfoot should have been the only person allowed to testify: We reject that contention. The point of the resentencing hearing was to arrive at a reliable calculation of Robinson's conduct; we were concerned only that the evidence have indicia of reliability, not that it be from any particular source.

As we have indicated, the calculations put Robinson at base offense level 36 because his relevant conduct involved at least 500 grams of crack. U.S.S.G. § 2D1.1(c)(2). He then received 8 levels of enhancements, for a final adjusted offense level of 43. As a career offender, he was in criminal history category VI. For such an offender, the guidelines require a mandatory life sentence. However, the statutory maximums for Robinson's offense are 40 years on two of the counts and 20 on the other. In that situation, pursuant to U.S.S.G. § 5G1.2(d), the maximum sentences were properly imposed to run consecutively, which is how the judge arrived at a sentence of 100 years. We see no clear error in these calculations.

Even though he wants to limit evidence regarding relevant conduct to that which Loonsfoot could provide, Robinson nevertheless argues that all other aspects of the sentencing should have been reconsidered following the

remand. We disagree. The calculation of relevant conduct was the problem we perceived in the original sentencing procedure. The case was remanded for a "new and more critical look at Robinson's relevant conduct . . . ." At 1071. In short, we issued a limited remand as authorized by 28 U.S.C. § 2106. *See United States v. Parker*, 101 F.3d 527 (7th Cir. 1996). Accordingly, at the resentencing proceeding the district court properly refused to reconsider issues involving the enhancements for Robinson's role in the offense and for the possession of a firearm as well as the identity of the drug as crack cocaine rather than some other form of cocaine. Perceiving no error in the proceedings, we AFFIRM the sentence imposed on Charles Robinson IV.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION DATED AND FILED DECEMBER 7, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 97-30025

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES R. ROBINSON, IV,

Defendant.

OPINION

RICHARD MILLS, U.S. District Judge:

Although a sentence of 100 years is very high, it is the sentence which Robinson, through his criminal activity, has earned.

It is the sentence for which the Sentencing Guidelines provide.

And, it is the sentence which this Court must reimpose.

Appendix C

I. PRELIMINARY ISSUES

This matter is before the Court following Charles R. Robinson, IV's, re-sentencing hearing. Before the Court could re-sentence Robinson, however, it had to resolve a few preliminary matters.

First, prior to the hearing, Robinson's counsel moved to withdraw his representation of Robinson. In his motion, Robinson's counsel represented that Robinson had asked him to file a motion to withdraw his representation based upon their inability to communicate and the current lack of trust between the two.

However, at the hearing, Robinson's counsel moved to withdraw his motion to withdraw his representation. Robinson's counsel informed the Court that Robinson's differences with him had been resolved and that Robinson wanted him to remain as his counsel during the re-sentencing hearing. Upon direct inquiry from the Court, Robinson confirmed that he wanted his current counsel to continue to represent him and his interests at the re-sentencing hearing. Accordingly, the Court allowed Robinson's counsel's motion to withdraw his motion to withdraw his representation of Robinson.

Second, on October 28, 1999, the Court received a courtesy copy of a pleading entitled "Petition for Extraordinary Writ" which Robinson, acting *pro se*, filed with the United States Supreme Court. In essence, Robinson asked the Supreme Court to issue a writ of mandamus instructing this Court to recuse itself and to transfer his

re-sentencing hearing to another district judge. Robinson has previously filed motions with this Court asking it to recuse itself, and the Court has denied those requests because the Court is not actually biased against him and because the Court's impartiality cannot reasonably be questioned in this matter. 28 U.S.C. § 144 & § 455(a). Robinson has also previously asked the United States Court of Appeals for the Seventh Circuit to issue a writ of mandamus disqualifying this Court from conducting his re-sentencing hearing, but the Seventh Circuit has denied his request. Because the Court has not received any instruction from a higher court to the contrary, the Court proceeded with Robinson's re-sentencing hearing.

Third, both Robinson, acting *pro se*, and his attorney, acting on his behalf, asked the Court to revisit all of the issues surrounding his original sentence. Specifically, Robinson and his counsel asked the Court to find that he does not qualify as a career criminal, that he should not receive a two level enhancement for possessing a firearm in relation to his drug dealing, that he should not receive a four level enhancement for being an organizer/leader, and that the Court should sentence him for possessing and distributing powder cocaine rather than crack cocaine. Robinson argued that this Court has the authority to reconsider all of these issues on remand because the reversal of his sentence unbundled his sentencing package, allowing the Court to consider these issues anew.

The Court disagrees. Contrary to Robinson's assertions, the Seventh Circuit's remand to this Court was limited to the issue of relevant conduct. Robinson relies upon the view of the majority of the circuits which hold that unless the

remand specifically limits a district court's inquiry, the district court can review sentencing matters *de novo*. *United States v. Caterino*, 29 F.3d 1390, 1394-95 (9th Cir. 1994); *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992); *United States v. Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996); *United States v. Sanchez Solis*, 882 F.2d 693, 699 (2nd Cir. 1989); *United States v. Campbell*, 168 F.3d 263, 265-66 (6th Cir. 1999).

However, the Seventh Circuit has adopted the minority view.[1] In this circuit,

> the scope of the remand is determined not by formula, but by inference from the opinion as a whole. If the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error. A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it.

United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996), citing *United States v. Polland*, 56 F.3d 776, 779 (7th Cir. 1995). The Seventh Circuit has adopted this position because, in its view, a *de novo* review at re-sentencing gives the

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1. The minority view has also been adopted by the Fifth, First, and D.C. Circuit Courts. *E.g.*, *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998); *United States v. Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997); *United States v. Ticchiarelli*, 171 F.3d 24, 32 (1st Cir. 1999).

defendant an unwarranted second bite at the apple, is prohibited by the law of the case doctrine, is implied by the limited nature of every remand, avoids multiple appeals, and avoids unnecessarily prolonging a case. *Id.* The Seventh Circuit's view is, of course, binding upon this Court.

In deciding Robinson's appeal, the Seventh Circuit opined that "even viewed deferentially, . . . the Loonsfoot statements fail to establish the kind of 'indicia of reliability' upon which a sentencing judge could comfortably rely. For that reason, *we think a new and more critical look at Robinson's relevant conduct is required.*" *United States v. Robinson*, 164 F.3d 1068, 1071 (7th Cir. 1999) (emphasis added). As such, the Court finds that its inquiry at re-sentencing is limited to a reconsideration of Robinson's relevant conduct, *i.e.*, the drug amounts for which he should be held accountable. All other issues raised by Robinson in his *pro se* commentary and by his counsel are outside the scope of the Seventh Circuit's remand, and therefore, this Court lacks the authority to consider them.

Furthermore, the law of the case doctrine prohibits this Court from reconsidering issues other than Robinson's relevant conduct at his re-sentencing hearing. This Court considered and rejected most of Robinson's objections at his initial sentencing hearing. In addition, the Seventh Circuit opined that the issues raised on appeal by Robinson other than his relevant conduct issue were meritless: "[h]aving reviewed the record, we conclude that . . . the sentencing judge did not err in invoking the gun or role-in-the-offense enhancements. Finally, the testimony at trial clearly established that Robinson distributed crack, not some less

devastating species of cocaine." *Robinson*, 164 F.3d at 1071 n. 1.

Accordingly, based upon the Seventh Circuit's finding that Robinson's claims are meritless, the law of the case doctrine prohibits this Court from revisiting Robinson's renewed objections to the Presentence Investigation Report ("PSR").[2] *See Polland*, 56 F.3d at 779 n. 1 (holding that "[w]e held, however, that of his many contentions, only some merited discussion. Though unstated, logic compels that our statement had but one conclusion: the other arguments were meritless. Similar language has been considered to constitute a decision on the merits for purposes of the law of the case doctrine."); *see also United States v. Minicone*, 26 F.3d 297, 299-300 (2nd Cir. 1994) (holding that the appellate court's statement that "[w]e hold that [defendant's] claims, including, among others, that he was a minor or minimal participant in the crimes charged, are without merit," without further discussion, precluded the district court from revisiting those issues).

Fourth, prior to the start of the re-sentencing hearing, Robinson asked the Court to prohibit the Government's witnesses from testifying. Robinson argued that the Seventh Circuit had anticipated that the Court would hear testimony from Gina Loonsfoot and from her alone. Robinson asserted that the Government was attempting to establish the drug amounts in the PSR through "backdoor" witnesses not

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2. Even if the Court were to reconsider the issues which Robinson and his counsel have raised anew, the Court would echo the Seventh Circuit's footnote in which that court stated that his objections were meritless. *Robinson*, 164 F.3d at 1071 n.1.

previously considered or relied upon by the United States Probation Office in compiling the PSR. Accordingly, Robinson asked the Court to exclude all witnesses other that Loonsfoot from testifying at the re-sentencing hearing.

However, the Court believes that the Seventh Circuit contemplated that, on remand, the Government may call witnesses other than Loonsfoot in order to support the PSR's findings. *See Robinson*, 164 F.3d at 1070 (noting that "[w]hile it's not required that a judge hear personally from *witnesses* under oath at a sentencing hearing about drug quantities, we think it's not a terribly bad idea to do so when the witness is going to provide the basis for, as here, 97 percent of a defendant's relevant conduct.") (emphasis added). The Government represented to the Court that although it attempted to locate Loonsfoot in order to have her testify at the hearing, it was unsuccessful. The Court finds nothing improper about having Robinson's girlfriend[3] and his drug suppliers[4] testify at the hearing in order to establish the amount of drugs for which he should be held accountable, and thus, his motion to excluded all witnesses other than Loonsfoot was denied.

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3. Contrary to his assertion, the PSR and the reports upon which the PSR relied did reference Robinson's girlfriend, Stephanie Whitehead.

4. The Government represented to the Court that although the PSR did not rely upon Tory Clay's (a/k/a "T Money") or Scott Allen's statements, it had previously disclosed those individuals to Robinson.

Appendix C

II. RELEVANT CONDUCT

Therefore, the only issue for the Court to resolve on remand was the drug amounts for which Robinson should be held accountable based upon his convictions and his relevant conduct. U.S.S.G. § 1B1.3. As the Seventh Circuit noted, however, the best that Robinson could hope for is to receive a base offense level of 34, with a final adjusted offense level of 42. *Robinson*, 164 F.3d at 1071. In order to receive a base offense level of 34, the Court would have to find that Robinson dealt with less than 500 grams of crack. If the Court were to make such a finding, then Robinson's sentencing guideline range would be 360 months to life imprisonment. On the other hand, if the Court were to find that Robinson dealt with at least 500 grams of crack, then his sentencing guideline range would be mandatory life.[5]

The Court found that Robinson had dealt with at least 500 grams of crack cocaine. The Court based this conclusion upon the testimony of the witnesses who testified at trial, the law enforcement reports which were presented to the

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5. Any finding by the Court that Robinson dealt with at least 500 grams of crack would result in a sentencing guideline range of mandatory life. Robinson has a criminal history category of VI because he is a career offender. U.S.S.G. § 4B1.1. Because he has eight levels of enhancements which must be added to his base offense level, *Robinson*, 164 F.3d at 1071 n. 1., it becomes irrelevant whether his base offense level is 36 (at least 500 grams but less than 1.5 kilograms of crack) or 38 (1.5 kilograms or more of crack) because the highest adjusted offense level which a defendant can receive is 43. U.S.S.G. Chapter 5, Part A, comment, n. 2. A defendant with an adjusted offense level of 43 and a criminal history category of VI has a sentencing guideline range of mandatory life.

Court at the first sentencing hearing, and the testimony at the re-sentencing hearing presented by Stephanie Whitehead, Tory Clay (a/k/a "T Money"), and Scott Allen.[6]

During the trial, the Government presented evidence that Robinson possessed 32.9 grams of crack on his three counts of conviction (2.1 + 14 + 16.8 grams). *Robinson*, 164 F.3d at 1070. The Government also presented evidence that Robinson possessed large sums of cash. For example, Springfield Police Officers Jerry Castles and J.T. Wooldrige testified that they discovered over $3,000.00 in Robinson's car when he was arrested. Thus, the Court found that Robinson should be held accountable for the 32.9 grams of crack which formed the basis for his convictions.

In addition, the Court again found that Robinson should be held accountable for the 56.7 grams of crack attributed to him by David Alton and the 54 grams of crack attributed to him by Michael Smith. *Id.* The Court believed that Alton's and Smith's statements bore a "sufficient indicia of reliability to support its probable accuracy." *United States v. Taylor*, 72 F.3d 533, 543 (7th Cir. 1995). Alton's and Smith's statements that Robinson dealt in large quantities of crack cocaine in Springfield, Illinois, were supported by the evidence presented at trial and by the evidence presented at his re-sentencing hearing. For example, David Alton told the Government that Robinson would occasionally weigh crack cocaine on a Deering brand balance scale; law enforcement officers recovered this type of scale from Robinson's vehicle on November 12, 1996. Accordingly, the

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6. The Court found all three witnesses to be credible.

Court finds that Robinson should be held accountable for 143.6 grams of crack (*i.e.*, 32.9 from the trial + 56.7 from Alton + 54 from Smith).

The remaining 356.4 plus grams of crack for which the Court held Robinson responsible were attributed to him by the testimony of his girlfriend Stephanie Whitehead and his suppliers Tory Clay and Scott Allen. At the re-sentencing hearing, Whitehead testified that she was Robinson's girlfriend from June 1996 until December 1996. During this time period, Robinson supplied her with crack; he also paid for hotel rooms in Springfield, Illinois, which they shared. Whitehead testified that Robinson's drug dealing was "his business," that he never had a legitimate job (although she observed him with large sums of cash),[7] and that Clay and Allen were his drug suppliers. She also claimed that Robinson always converted the powder cocaine which he received from Clay and Allen into crack and that she watched him convert the powder cocaine into crack using a microwave and baking soda.

In addition, Whitehead asserted that Robinson sent her to Cleveland, Ohio, on July 29, 1996, and to Los Angeles, California, in the fall of 1996 to obtain drugs. Finally, Whitehead testified that between June 1996 and December 1996, Robinson obtained cocaine from Allen on 100 occasions and that on each of those occasions he received between one and three ounces of cocaine.

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7. Whitehead observed Robinson with approximately $15,000.00 on one occasion.

Likewise, Tory Clay (a/k/a "T Money") testified that Robinson dealt in large quantities of crack cocaine.[8] Clay testified that he supplied Robinson with between six and eight kilograms of powder cocaine between late January or early February 1995 until August 1996. Clay also testified that

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8. Prior to Clay's testimony, Robinson made an oral motion to strike Clay as a witness because attorney Jon Gray Noll had represented both Clay and him. Robinson argued that because attorney Noll had represented both, a conflict of interest existed which precluded Clay from offering testimony against him. Although Robinson, through his attorney, asserted that attorney Noll knew of Clay's cooperation against him, Clay denied, while under oath, that there was any cooperation discussed between he and attorney Noll after Jon Gray Noll became his attorney. Moreover, both sides seemed to agree that attorney Noll was unaware that Clay and Robinson knew each other. *See United States v. Hopkins*, 43 F.3d 1116, 1119 (6th Cir. 1995) (a conflict is hypothetical when an attorney does not even know of a potential conflict). Finally, although the Court possessed the authority to excluded Clay's testimony, the Court did not believe that the exclusion of Clay's testimony would be a proper remedy under the circumstances. *See United States v. Messino*, 181 F.3d 826, 830 (7th Cir. 1999) (holding that a district court has the discretion to exclude evidence to remedy a conflict of interest on "rare occasions"). Robinson was convicted on December 4, 1997, and Clay did not retain attorney Noll until April or May of 1998. Clay testified that there was never any cooperation discussed between attorney Noll and himself after he retained attorney Noll to represent him. Clay also stated that once attorney Noll learned that Clay was to testify in Robinson's re-sentencing hearing, attorney Noll declined to speak with him. The Court did not believe that these circumstances constituted the rare occasion where the Court should exclude a witness with relevant information from testifying based upon a potential conflict of interest. Therefore, the Court denied Robinson's oral motion to prohibit Clay from testifying at the re-sentencing hearing.

although he sold Robinson powder cocaine only, on one occasion in May or June of 1996, he purchased two or three ounces of crack from Robinson while at Earl Bodine's house. Clay claimed to have seen Robinson with large amounts of cash[9] and to have observed him cook powder cocaine into crack while at his brother Mack Robinson's house and while at Rick Carraro's house. Although Clay acknowledged that Robinson smoked crack, he opined that it would have been impossible for Robinson to have consumed all of the drugs supplied to Robinson by him if for no other reason than the cost.[10]

Finally, Scott Allen testified that he supplied Robinson with a minimum of fifteen ounces of cocaine between July 1996 and October 1996. Allen confirmed that Whitehead traveled to Los Angeles, pursuant to Robinson's direction, where she obtained a kilogram of cocaine from Allen's source. Of that kilogram, Robinson purchased six to eight ounces from Allen. Allen asserted that although he was aware that Robinson smoked crack, it would have been impossible for Robinson to have consumed all of the cocaine which Robinson purchased from him because the transactions were too frequent and because Robinson did not have a legitimate job to pay for all of the cocaine which was purchased; therefore, Robinson would have to have sold some of the cocaine in order to pay for his purchases.

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9. Clay testified that he observed Robinson possess between $10,000.00 and $15,000.00 and four ounces of cocaine on one occasion.

10. Clay would occasionally "front" the cocaine to Robinson. "Fronting" simply means that he would receive the drugs based upon his promise to pay later.

Based upon all of this evidence, the Court found that the Government had met its burden of establishing by a preponderance of the evidence the factors which determined Robinson's base offense level and relevant conduct. *United States v. Garcia*, 66 F.3d 851, 856 (7th Cir. 1995). Although Robinson offered some evidence at the re-sentencing hearing, the Court found that he had not met his burden of proving that the PSR was inaccurate.[11] *United States v. Coonce*, 961 F.2d 1268, 1279-80 (7th Cir. 1992); *United States v. Isirov*, 986 F.2d 183, 185-86 (7th Cir. 1993). Accordingly, the Court found that based upon his drug activity underlying his counts of conviction and his relevant conduct, Robinson should be held accountable for at least 500 grams of crack.

Finally, Robinson had asked the Court for a downward departure pursuant to U.S.S.G. § 5K1.2 and § 5K2.0. Robinson had asserted that he was entitled to a downward departure pursuant to § 5K1.2 because the Government was penalizing him for his refusal to cooperate. Specifically, Robinson alleged that because he refused to cooperate with

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11. At the re-sentencing hearing, Robinson called two witnesses, Dwight Slooter and Myles Galbreth, Jr. Slooter testified that he was Robinson's landlord and his SSI payee. Slooter testified that he never saw any evidence of any drug trafficking in Robinson's apartment and that Robinson never had any money most of the time. However, Slooter's testimony is inconsistent with the evidence that Robinson was able to purchase several ounces of cocaine ranging from $900.00 to $1600.00 an ounce on his approximately $200.00 per month SSI check. Furthermore, although Galbreth testified that Robinson was a heavy drug user, his testimony actually supported the PSR's finding in that he testified that he purchased crack from Robinson and that he witnessed Robinson cook powder cocaine with baking soda and water into crack.

the Government, the Government provided a plethora of law enforcement reports to the United States Probation Office which unfairly attributed large drug amounts to him. Moreover, Robinson asserted that he was entitled to a downward departure pursuant to § 5K2.0 because his case is so unusual that if fell outside of the heartland of cases within the sentencing guidelines. Robinson claimed that this is so because his criminal history is not extensive enough to warrant such an extended period of incarceration, because the career criminal enhancement overstated his criminal history, because during his incarceration he has made rehabilitative strides including completing educational classes and a drug rehabilitation program, and because his sentence is inherently unfair given his offenses of conviction.

However, before the Court could rule upon Robinson's motion for a downward departure, his counsel moved to withdraw the motion. Upon direct inquiry from the Court, Robinson confirmed that he wished to withdraw his motion for a downward departure. Accordingly, the Court allowed Robinson to withdraw his motion for a downward departure.

III. CONCLUSION

In summary, the Court found that Robinson had a base offense level of 36 because his offenses of conviction and relevant conduct involved at least 500 grams of crack. U.S.S.G. § 2D1.1(c)(2). In addition, the Court found that Robinson should receive eight levels of enhancements[12] —

12. The Seventh Circuit found that this Court "did not err in invoking the gun or role-in-the-offense enhancements." *Robinson*, 164 F.3d at 1071 n. 1.

two for possession of a dangerous weapon (U.S.S.G. § 2D1.1(b)(1)), four for being an organizer or leader of a criminal activity which involved five or more participants (U.S.S.G. § 3B1.1(a)), and two for obstructing justice (U.S.S.G. § 3C1.1) — for a final adjusted offense level of 43.[13] Finally, the Court found that Robinson had a criminal history category of VI because he is a career offender. U.S.S.G. § 4B1.1. Based upon these findings, Robinson had a sentencing guideline range of mandatory life.

However, pursuant to U.S.S.G. § 5G1.1(c)(1), Robinson's sentence could not be greater than the statutorily authorized maximum sentence. Here, the jury found Robinson guilty of all three counts charged in the indictment.[14] Counts 1 and 3 carry a maximum sentence of 40 years of imprisonment per count, and count 2 carries a maximum sentence of 20 years. Pursuant to U.S.S.G. § 5G1.2(d), "[i]f the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment."[15] The Court read U.S.S.G. § 5G1.2(d)'s

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13. Again, U.S.S.G. Chapter 5, Part A, comment, n. 2 provides that "[a]n offense level of more than 43 is to be treated as an offense level of 43."

14. The Seventh Circuit has affirmed Robinson's convictions. *Robinson*, 164 F.3d at 1071.

15. "Total punishment" is defined as the combined length of the sentences and is determined by the adjusted combined offense level. U.S.S.G. § 5G1.2, comment.

language as mandatory (*i.e.*, "shall"), requiring it to impose consecutive sentences as to each count upon which Robinson has been convicted.

Ergo, the Court reimposed the same sentence upon Defendant consisting of 480 months of imprisonment on each of Counts 1 and 3 and 240 months on Count 2, to be served consecutively, for a total of 1,200 months. Upon being discharged from the Bureau of Prisons, Defendant was sentenced to a 5 year term of supervised release on Counts 1 and 3 and to a 3 year term of supervised release on Count 2, to be served concurrently. Defendant was ordered to pay a special assessment of $300.00 immediately. No fine or restitution were ordered. The Court, again, recommended to the Bureau of Prisons that Defendant be placed in a facility with a drug rehabilitation program and as close to Springfield, Illinois, as possible.

ENTER: 7 December, 1999

FOR THE COURT:

s/ Richard Mills
RICHARD MILLS
UNITED STATES DISTRICT
JUDGE

APPENDIX D — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED AND FILED NOVEMBER 29, 1999

United States District Court
Central District of Illinois

Case Number: 3:97CR30025-001

UNITED STATES OF AMERICA

v.

CHARLES R. ROBINSON, IV

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Howard Feldman
Defendant's Attorney

Date of Original Judgment: 06/01/1998

Reason for Amendment:

☒ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

* * *

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THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1, 2 & 3 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841 (b)(1)(B)	Possession with Intent to Distribute a Controlled Substance	10/27/1996	1
21 U.S.C. § 841 (b)(1)(C)	Distribution of a Controlled Substance	11/12/1996	2
21 U.S.C. § 841 (b)(1)(B)	Possession with Intent to Distribute a Controlled Substance	11/12/1996	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 337-54-3564	11/23/1999 Date of Imposition of Judgment
Defendant's Date of Birth: 02/10/1962	
Defendant's USM No.: 11087-026	s/ Richard Mills Signature of Judicial Officer
Defendant's Residence Address: 509 Avondale Drive Springfield, IL 62704	RICHARD MILLS US DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Mailing Address: 509 Avondale Drive Springfield, IL 62704	11/29/1999 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 1200 month(s).

This term consists of 480 months on Counts 1 and 3 and 240 months on Count 2 all to run consecutively.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in a facility with drug treatment available as close to Springfield, Illinois as possible.

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

This term consists of 5 years on each of Counts 1 and 3 and 3 years on Count 2 all to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

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For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision — Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

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2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall

permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not own, purchase or possess a firearm, ammunition, or other dangerous weapon.

2. The defendant shall, at the direction of the probation officer, participate in a program for substance abuse treatment/counseling including testing to determine whether he has used controlled substances and/or alcohol. During the entire term of supervision, defendant will abstain from the use of alcohol, all other legally obtainable intoxicants, and all mood-altering substances unless prescribed by a physician. Defendant shall pay for these services as directed by the probation officer.

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3. The defendant shall participate in psychiatric services and/or a program of mental health counseling/treatment as directed by the probation officer and shall take any and all prescribed medications as directed by the treatment providers. Defendant shall pay for these services as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 300.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

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The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached order.

Guideline Range Determined by the Court:

Total Offense Level: 43

Criminal History Category: VI

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Imprisonment Range: 480 to 1200 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 25,000.00 to $ 5,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

* * * *

APPENDIX E — RELEVANT STATUTES

21 U.S.C. §§ 841(a) and (b)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving —-

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of —

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(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become

final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving —

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(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of —

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

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(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years

and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * *